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No. 06-614

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ERIC RUBIN-SCHNEIDERMAN,

Petitioner,

v.

MERIT BEHAVIORAL CARE CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MERIT BEHAVIORAL CARE CORPORATION AND DR. SATI AHLUWALIA

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COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should this Court overturn holdings established in cases ranging from *Mertens* to *Sereboff*, and followed by each and every Circuit Court of Appeals, that ERISA Section 502(a)(3) does not permit the award of compensatory damages, especially when Petitioner's equitable arguments rely upon the same type of historical treatises that this Court has previously considered and rejected?

2. Should this Court continue to adhere to its view that ERISA embodies a careful statutory balancing of interests and that it is up to Congress to amend ERISA to permit the type of relief that Petitioner seeks?

3. Should Petitioner be allowed to pursue compensatory damages when Petitioner chose not to pursue his ERISA-created remedy?

4. Should Petitioner be allowed to pursue a claim against Respondent based upon a 1997 incident when the claim was discharged in bankruptcy?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Merit Behavioral Care Corporation, is wholly owned by Magellan Health Services Inc., a publicly traded corporation.

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COUNTER-STATEMENT OF THE CASE

Respondents Merit Behavioral Care Corporation ("Merit") and Dr. Sati Ahluwalia respectfully request that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's opinion in this case. There are no compelling reasons for the Court to grant this petition.

Based largely upon dated treatises, Petitioner urges this Court to overturn a large body of case law holding that compensatory damages are not available for an alleged breach of ERISA Section 502(a)(3) (29 U.S.C. Section 1132(a)(3)). This Court has long recognized that ERISA reflects a careful Congressional balancing of interests. As part of this balancing, Congress chose not to permit individuals such as Petitioner to obtain compensatory damages. Congress instead created a remedy whereby individuals such as Petitioner, upon denial of his requested benefits, could have sued to recover those benefits, and, if successful, recover his attorneys fees. Petitioner chose not to pursue that ERISA remedy, but instead brought this lawsuit three years later to recover compensatory damages. Petitioner urges this Court to overturn *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063 (1993), which held that Section 502(a)(3) does not permit a plaintiff to recover the type of compensatory damages that Petitioner seeks. It is noteworthy that in the thirteen years since this Court decided *Mertens*, Congress has not amended ERISA to change the careful balancing of interests repeatedly observed by this Court.

This Court has on a number of occasions after *Mertens* held that the type of compensatory damages sought by the Petitioner are not available under ERISA Section 502(a)(3). Indeed, earlier this year this Court reaffirmed this position

on the scope of equitable relief available under Section 502(a)(3) in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. __, 126 S.Ct. 1869, 1873-74 (2006). No conflict on this issue exists between or among the Courts of Appeals, or between any lower court and this Court. Each and every Court of Appeals has rejected Petitioner's argument for an expansion of ERISA § 502(a)(3) to include compensatory damages. Finally, none of the dated sources cited by Petitioner provide compelling reasons for granting review. This Court has specifically considered and rejected such arguments based on similar sources on several occasions. The decisions of the lower courts in this case were fully consistent with the established precedent. The petition should therefore be denied.

COUNTER-STATEMENT OF FACTS

Petitioner's father, David Schneiderman, and his mother, Anita Rubin, are both employed at Barson Hardware Co. ("Barson Hardware"). (A. 63).[1] As part of their employment, Barson Hardware provided group health coverage through the Barson Hardware Plan to both David Schneiderman and Anita Rubin, as well as their eligible dependent children, including Petitioner, "through a contract purchased from Defendant Empire." (A. 63).

The Barson Hardware Empire Plan provides a covered person with the option to obtain in-network or out-of-network benefits. (A. 68-69). A covered person such as the Petitioner may choose his or her own treating physicians. (A. 69). A utilization manager then decides whether the treatment

1. References to "A. __" are to the Record on Appeal before the Second Circuit.

suggested by the covered person's own treating physician is covered under the Barson Hardware Plan. (A. 84-86). If a plan member chooses in-network coverage, Article II, titled "Utilization Management Program," provides a number of steps for the member to follow in order to determine if the requested treatment is covered under the member's plan. (A. 84-86). If the requested benefit is covered under the Barson Hardware Plan, the insured may obtain reimbursement for that treatment. *Id.*

Under the Barson Hardware Plan, the utilization review manager and its agents are not the treating physicians. Nor do they provide any medical treatment whatsoever to the covered person. *Id.* Instead, the role of utilization review managers is solely to make determinations regarding benefit coverage under the Barson Hardware Plan. (A. 85).

Respondent Merit is a corporation that provides utilization review management for Empire for the mental health care portion of the Barson Hardware Plan. (A. 85). Merit is alleged to have provided utilization review in order "to determine whether mental health services proposed to be rendered to [Empire] beneficiaries were medically necessary and therefore covered under the BlueChoice PPO program." (A. 11-12, ¶¶ 3, 9).

Respondent Dr. Ahluwalia was a physician employed by Merit who performed utilization review services on Merit's behalf. (A. 11, ¶ 4). She was not Petitioner's treating physician. Nor was she involved in examining or evaluating Petitioner in person. (A. 14, ¶ 16).

Petitioner had been under psychiatric care, (A. 12-13, ¶ 10), and his treating psychiatrist was Dr. Samuel C.

Klagsbrun, a doctor not employed by or affiliated with Merit or Empire. In August 1997, Petitioner's treating physician recommended in-patient psychiatric care at Four Winds Hospital. (A. 13, ¶ 11). In an effort to obtain coverage for in-patient care, Petitioner's father, David Schneiderman, contacted an unidentified person at Merit's Mental & Nervous Disorders In-patient Division regarding Petitioner's request for pre-approval for in-patient treatment at Four Winds Hospital. (A. 165, ¶ 9). The Merit employee contacted by David Schneiderman stated that Petitioner was required to undergo a pre-admission assessment at Four Winds before Merit could determine whether benefits would be authorized. *Id.*

On September 8, 1997, Petitioner underwent a preauthorized psychiatric evaluation at Four Winds and applied to Merit for preauthorization of his admission. (A. 13, ¶ 13). This preauthorization process is alleged to have consisted of telephone conversations between the Four Winds evaluating physician and unidentified Merit employees. *Id.* Petitioner alleges that unidentified Merit medical personnel then orally denied coverage for Petitioner's admission to Four Winds Hospital. (A. 13, ¶ 14).

Respondent Dr. Ahluwalia is alleged only to have written a letter the following day, September 9, 1997, confirming Merit's prior oral determination that Petitioner did not meet the recognized national professional criteria to be eligible to receive benefits for in-patient care at Four Winds. (A. 13-14, ¶ 15). Dr. Ahluwalia wrote as follows:

> Based on the information that we received and national professional criteria for medical necessity, MBC cannot authorize inpatient

> psychiatric treatment at Four Winds Hospital effective 09/08/97. It can not be authorized for the following reasons:
>
> Based on information given, current level of symptoms can be treated at a lower level of care. Recommendation is for an intensive outpatient program.
>
> Regardless of our determination you and the patient have the ultimate responsibility for determining the appropriateness of treatment.

(A. 178).

Dr. Ahluwalia provided no medical or treatment-related information in her September 9, 1997 letter, beyond informing Petitioner that he was eligible to receive benefits for treatment at an out-patient, rather than in-patient, facility. Dr. Ahluwalia did not opine on the appropriateness of any particular type of medical treatment for Petitioner's condition.

Petitioner's treating physician (who is not a defendant in this action) agreed with the statement in Dr. Ahluwalia's letter that Petitioner could be treated as an out-patient. (A. 179). Indeed, in a subsequent letter to Merit and Dr. Ahluwalia, Petitioner's own physician described an out-patient program as "absolutely appropriate for Eric," albeit at a different facility than Four Winds. *Id.*

Upon Merit's denial of the requested benefits coverage for in-patient care, Petitioner had the right to commence an immediate action under ERISA seeking an injunction to:

> Recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B) (ERISA § 502(a)(1)(B)). Additionally, ERISA provides that a Court has the discretion to award attorneys fees and costs of the action to the plaintiff where there was an improper denial of benefits. ERISA § 502(g)(1).

However, Petitioner chose not to avail himself of the remedies to which he was entitled under ERISA and, instead, elected to accept coverage for out-patient benefits. Seven months after the benefits denial for in-patient care, Petitioner is alleged to have attempted to commit suicide. (A. 14-15, ¶ 20). Petitioner commenced this action more than three years after the September 9, 1997 letter reiterating Merit's prior oral denial of benefits for in-patient care.

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States outlines common considerations governing review on certiorari and provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." This petition falls within none of the categories which, while "neither

controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers." There is no conflict among decisions of United States Courts of Appeals, or between United States Courts of Appeals and state courts of last resort (Rule 10(a) & (b)). The lower court's decision does not represent a substantial departure "from the accepted and usual course of judicial proceedings" by a United States Court of Appeals, justifying an exercise of the Supreme Court's supervisory power (Rule 10(a)). To the contrary, the lower courts carefully followed the established precedent of this Court. This is also not a situation where a decision by a state court or a United States Court of Appeals of an important question of federal law either has not yet been settled by this Court or conflicts with the relevant decisions of this Court (Rule 10(c)).

Petitioner essentially asks this court to overturn a body of caselaw decided by this Court and followed by each of the eleven Circuit Courts of Appeal. Certiorari should be denied.

A. Petitioner's Arguments Were Long Ago Considered and Rejected By This Court in *Mertens*, Which Found That Money Damages Are Not Available Under ERISA Section 502(a)(3)

In *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S.Ct. 2063 (1993), this Court firmly held that § 502(a)(3) does not permit an award of monetary damages. The *Mertens* Court determined that the "equitable relief" contemplated by Section 502(a)(3) is limited to "those categories of relief that were *typically* available in equity," including injunction, mandamus, and restitution, "but not compensatory damages." *Id.* at 256, 113 S.Ct. at 2069 (emphasis in original). The

Mertens Court explicitly rejected the argument, based on "ERISA's roots in the common law of trust," that the same remedies available in a suit for enforcement of a trust were intended to be available in an ERISA action. *Id.* at 255, 113 S.Ct. at 2068. This Court noted that the enforcement of a trust by the courts of equity was merely an example of "'*legal* remedies' granted by an *equity* court," *Id.* at 256, 113 S.Ct. at 2069 (emphasis added), and thus not "equitable relief" within the meaning of Section 502(a)(3). This Court explained:

> Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*. We will not read the statute to render the modifier superfluous.

Id. at 257-58, 113 S.Ct. at 2069 (emphasis in original). Similarly, in *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 145-46, 105 S.Ct. 3085, 3092 (1985), this Court noted that Congress had included "legal or equitable relief" in an early draft version of ERISA, but specifically dropped the reference to "legal" relief in the final statute.

B. The Rule of *Mertens* Has Been Specifically Followed By This Court

The petition reads as if the 1993 *Mertens* case was a once-decided case otherwise at odds with a body of law and commentary. In fact, the legal principle set forth in *Mertens*,

that compensatory damages are not "equitable relief" under ERISA, has been cited and followed in a number of subsequent decisions by this Court. In *Varity Corporation v. Howe*, 516 U.S. 489, 509-10, 116 S.Ct. 1065, 1076 (1996), this Court cited *Mertens* for the proposition that "compensatory and punitive damages are not 'equitable relief' within the meaning of [ERISA § 502(a)(3)]" in discussing an individual's right to bring an ERISA claim.

More recently, in *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 122 S.Ct. 708 (2002), this Court revisited the definition of "equitable relief" in Section 502(a)(3). In *Great-West*, petitioners attempted to characterize the relief they sought as "equitable" within the *Mertens* standard, requesting specific performance of a reimbursement provision of ERISA, and restitution of the proceeds from the respondents' tort action. This Court stated that "an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity," and thus dismissed petitioners' claim for specific performance. *Great-West*, 534 U.S. at 210-11, 122 S.Ct. at 713.

The *Great-West* Court also rejected petitioners' assertion that the restitution they were seeking was a form of equitable relief, holding:

> [N]ot all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. . . . In cases in which the plaintiff "could *not* assert title or right to possession of particular

> property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law*. . . . In contrast, a plaintiff could seek restitution *in equity* . . . where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession.

Id. at 212-13, 122 S.Ct. at 714 (*quoting* 1 Dobbs § 4.2(1) at 571) (other citations omitted) (emphasis in original). Thus, although restitution could occasionally be characterized as "equitable," the restitution sought in *Great-West* – "the imposition of personal liability for the benefits that they conferred upon respondents" – was legal in nature. *Id.* at 214, 122 S.Ct. at 715. Thus, this Court held that "§ 502(a)(3) does not authorize this action." *Id.* at 221, 122 S.Ct. at 719. Here, by contrast, there is no need to make fine distinctions between equitable and legal restitution, as Petitioner admittedly seeks compensatory damages, which the *Great-West* and *Mertens* Courts termed "the classic form of *legal* relief." *Id.* at 210, 122 S.Ct. at 713 (emphasis in original).

In *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S.Ct. 2488 (2004), this Court also stated that monetary relief is not available under § 502(a)(3), discussing the prior holding in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 122 S.Ct. 2151 (2002) as follows:

> There, we described our holding in *Ingersoll-Rand* as follows: "[W]hile state law duplicated the elements of a claim available under ERISA, it converted the remedy from an equitable one under

> § 1132(a)(3) . . . into a legal one for money damages . . ." 536 U.S., at 379, 122 S.Ct. 2151. The point of this sentence was to describe why the state cause of action in *Ingersoll-Rand* was pre-empted by ERISA § 502(a): It was pre-empted because it attempted to convert an equitable remedy into a legal remedy.

542 U.S. at 215-16, 124 S.Ct. at 2499.

Earlier this year, this Court yet again affirmed its position that damages are not available under ERISA § 502(a)(3). In *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. __, 126 S.Ct. 1869 (2006), this Court stated as follows:

> In *Mertens v. Hewitt Associates*, 508 U. S. 248 (1993), we construed [ERISA § 502(a)(3)] to authorize only "those categories of relief that were *typically* available in equity," and thus rejected a claim that we found sought "nothing other than compensatory *damages*."

Sereboff, 547 U.S. at __, 126 S.Ct. at 1873 (emphasis in original). This Court distinguished Mid Atlantic's situation, in which monetary relief was available, from the situation in *Great-West Life & Annuity Insurance Company v. Knudson*, where monetary relief was not available, by noting:

> Unlike Great-West, Mid Atlantic did not simply seek "to impose personal liability . . . for a contractual obligation to pay money." *Knudson*, 534 U. S. at 210, 122 S.Ct. 708. It alleged breach of contract and sought money, to be sure, but it sought its recovery through a constructive trust

> or equitable lien on a specifically identified fund, not from the Sereboffs' assets generally, as would be the case with a contract action at law.

Sereboff, 547 U.S. at __, 126 S.Ct. at 1874.

Like Great-West, Petitioner seeks to impose liability for a contractual obligation to pay money. He does not seek its recovery through a constructive trust or equitable lien on a specifically identified fund, but seeks it through Respondents' collective assets generally. This is not equitable relief as this Court has defined that term in *Mertens* and the cases that followed.

C. This Court Has Recognized That ERISA Represents A Careful Balancing of Interests By Congress and That It Is Up To Congress To Change ERISA To Allow for Compensatory Damages

This Court has time and again firmly rejected attempts to expand ERISA-remedies from those specifically enumerated by Congress. As stated in *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556 (1987),

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain

> remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted ... provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

(emphasis in original) (citation omitted); *see also Davila*, 542 U.S. at 208-09, 124 S.Ct. at 2495.

This Court has recognized that Congress viewed an important public interest of ERISA as encouraging employers to offer benefit plans and was concerned that employers might be discouraged to do so if they were subject to costly litigation seeking compensatory damages. *See Rush Prudential HMO, Inc.*, 536 U.S. at 379, 122 S.Ct. at 2166 (discussing "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities"); *Mertens*, 508 U.S. at 262-63, 113 S.Ct. at 2072 (noting the tension between ERISA's goals of benefiting employees and containing pension costs). In enacting ERISA remedies, Congress chose the public interest of fuller insurance coverage over granting individual plan participants the right to obtain compensatory damages. As stated in *Davila*, 542 U.S. at 215, 124 S.Ct. at 2499, "[t]he limited remedies available under ERISA are an inherent part of the 'careful balancing' between ensuring fair and prompt

enforcement of rights under a plan and the encouragement of the creation of such plans."

Similarly, in *Varity Corporation*, 516 U.S. at 497, 116 S.Ct. at 1070, this Court recognized that the enumerated ERISA enforcement procedures are part of "Congress' desire to offer employees enhanced benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, *or litigation expenses*, unduly discourage employers from offering welfare benefit plans in the first place" (emphasis added). The *Mertens* Court recognized that ERISA was "the product of a decade of congressional study of the Nation's private employee benefit system" (508 U.S. at 251, 113 S.Ct. at 2066) and that Courts should not adjust the balance struck by Congress of the competing goals of "benefiting employees and the subsidiary goal of containing pension costs" (*Id.* at 262-63, 113 S.Ct. at 2072). As stated by the *Pilot Life* Court,

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Pilot Life Ins. Co., 481 U.S. at 54, 107 S.Ct. at 1556.

Accordingly, while Petitioner asserts that obtaining compensatory damages is an important interest, this Court has recognized that Congress in creating ERISA carefully balanced several other competing public interests.

D. Every Circuit Has Followed *Mertens* and Its Progeny and Held That Money Damages Are Not Available Under ERISA Section 502(a)(3)

According to Supreme Court Rule 10(a), one factor that this Court will consider when determining whether to grant review is whether:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Rule 10(a). This factor is not present here; there is no allegation of a departure from the "accepted and usual course of judicial proceedings," and the Second Circuit's decision in this case does not conflict with the decision of another United States Court of Appeals or state court of last resort.

In fact, there is no circuit split; every circuit has recognized *Mertens* as controlling and has held that money damages are not available under ERISA Section 502(a)(3). *See Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994); *Gerosa v.*

Savasta & Co., Inc., 329 F.3d 317 (2d Cir. 2003); *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255 (3d Cir. 1995); *Griggs v. E.I. Dupont de Nemours & Co.*, 385 F.3d 440 (4th Cir. 2004); *Coop. Benefit Adm'rs, Inc. v. Ogden*, 367 F.3d 323 (5th Cir. 2004); *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (6th Cir. 2001); *Buckley Dement, Inc. v. Travelers Plan Adm'rs of Ill, Inc.*, 39 F.3d 784 (7th Cir. 1994); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (8th Cir. 1999); *Reynolds Metals Co. v. Ellis*, 202 F.3d 1246 (9th Cir. 2000); *Callery v. U.S. Life Ins. Co. in the City of NY*, 392 F.3d 401 (10th Cir. 2004); *Broaddus v. Florida Power Corp.*, 145 F.3d 1283 (11th Cir. 1998).

E. Petitioner Had An ERISA Remedy, But Chose Not To Pursue That Remedy

Justice Ginsburg's *Davila* concurrence cited by Petitioner expressed concern for those situations in which a plaintiff "affected by ERISA-proscribed wrongdoing" cannot gain "make-whole relief." *Davila*, 542 U.S. at 222, 124 S.Ct. at 2503. Petitioner does not have the type of situation addressed by Justice Ginsburg. *Cf. Varity Corp.*, 516 U.S. at 515, 116 S.Ct. at 1079 ("They must rely on the *third* subsection [§502(a)(3)] or they have no remedy at all") (emphasis in original).

Indeed, upon being denied coverage for in-patient care in 1997, Petitioner could have commenced an immediate action under ERISA § 502(a)(1)(B) seeking an injunction to obtain the very same in-patient care. *Cf. Downes v. JP Morgan Chase & Co.*, 2004 WL 1277991, *2 (S.D.N.Y. June 8, 2004) ("it is questionable . . . whether an action pursuant to § 502(a)(3) can seek '*appropriate* equitable relief' where, as here, another ERISA provision (here, § 502(a)(1)(B))

offers the plaintiff adequate relief") (emphasis in original); *Davila*, 542 U.S. at 210, 124 S.Ct. at 2496 ("if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B) . . . then the individual's cause of action is completely preempted . . .").

ERISA § 502(a)(1)(B) provides for a civil action by a plan participant or beneficiary,

> to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, as to clarify his rights to future benefits and on the terms of the plan.

29 U.S.C. § 1132(a)(1)(B). This section has been repeatedly used by plan participants to successfully obtain plan benefits. *See, e.g., Marro v. K-III Commc'ns Corp.*, 943 F.Supp. 247 (E.D.N.Y. 1996); *Dozsa v. Crum & Forster Ins. Co.*, 716 F.Supp. 131 (D. N.J. 1989); *Mattive v. Healthsource of Savannah, Inc.*, 893 F.Supp. 1559 (S.D.Ga. 1995). If Petitioner had pursued this statutory remedy, he could have even been awarded his attorneys' fees and costs if successful. ERISA § 502(g)(1).

Here, Petitioner did not pursue his ERISA rights. He instead waited over three years to bring this action seeking compensatory damages. Petitioner should not be able to use ERISA § 502(a)(3) to obtain money damages in the guise of equitable relief when he long ago made a conscious and voluntary choice to abstain from utilizing ERISA § 502(a)(1)(B) to obtain the treatment he now claims that he needed.

II. NONE OF THE SOURCES CITED BY PETITIONER PROVIDES A COMPELLING REASON FOR OVERTURNING *MERTENS*

The sources cited by Petitioner provide no compelling reasons for overturning *Mertens*. Petitioner cites treatises from the years 1737, 1795, 1836, and 1850 in an attempt to force compensatory monetary damages under the rubric of "equitable relief" as that term is used in the ERISA statute enacted in 1974. In fact, this Court has specifically considered Petitioner's argument concerning the trust law analogy and the availability of damages in courts of equity at the time of the divided bench, and has nevertheless found that damages are not within the scope of "appropriate equitable relief" under ERISA § 502(a)(3).

Justice White's dissent in *Mertens* discusses the availability of "a compensatory monetary award . . . in the equity courts under the common law of trusts." *Mertens*, 508 U.S. at 263, 113 S.Ct. at 2072. Like Petitioner, the dissent similarly quoted from historical treatises and cases. *Id.* at 266, 113 S.Ct. at 2074 (quoting J. Tiffany & E. Bullard, *Law of Trusts and Trustees*, 585-86 (1862)); *Id.* at 270, 113 S.Ct. at 2076 (citing *Stevens v. Gladding*, 17 How. 447 (1855); *Livingston v. Woodworth*, 15 How. 546 (1854); 2 J. Sutherland, *Law of Damages* § 392 (3d ed. 1903); W. Hale, *Law of Damages*, 319 (2d ed. 1912); 1 T. Sedgwick, *Measure of Damages* § 371 (8th ed. 1891)). The majority of the Court recognized the existence of such authority but ultimately determined that "appropriate equitable relief" under ERISA § 502(a)(3) did not include everything that could be awarded at the time of the divided bench. *Mertens*, 508 U.S. at 256-58, 113 S.Ct. at 2068-70.

In *Great-West*, this Court specifically addressed the viability of the law-equity dichotomy and its effect in the context of ERISA § 502(a)(3):

> It is easy to disparage the law-equity dichotomy as "an ancient classification" . . . and an "obsolete distinction[n]" . . . Like it or not, however, that classification and distinction has been specified by the statute; and there is no way to give the specification meaning—indeed, there is no way to render the unmistakable limitation of the statute a limitation *at all*—except by adverting to the differences between law and equity to which the statute refers.

Great-West, 534 U.S. at 216-17, 122 S.Ct. at 716 (internal citations omitted) (emphasis in original). This Court also noted the current "well known" contours of the term "equitable relief," and further stated, "[r]arely will there be need for any more 'antiquarian inquiry.'" *Id.* at 217, 122 S.Ct. at 716. Finally, this Court noted the confusion in "congressional use (and lawyers' understanding) of the statutory term 'equity'" if that term was revised to include legal remedies, even if such remedies were available in courts of equity at the time of the divided bench. *Id.* at 217, 122 S.Ct. at 716-17.

Thus, rather than offering any reason as to why a well-settled body of case law should be overturned, Petitioner offers the same type of historical arguments that this Court has already considered and rejected.

III. THIS IS NOT A PROPER CASE FOR REVIEW FOR THE ADDITIONAL REASON THAT THE CLAIM AGAINST RESPONDENT MERIT HAS BEEN DISCHARGED IN BANKRUPTCY

On March 11, 2003, Respondent Merit and certain of its affiliated entities filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), Case No. 03-40515 (PCB) (Jointly Administered). On June 3, 2003, Petitioner, as an alleged creditor of Merit, filed with the Bankruptcy Court a proof of claim against Merit (Claim Number 444) seeking recovery for the same claims that Petitioner alleged in this action (the "Bankruptcy Claim").

On October 8, 2003, the Bankruptcy Court entered an Order granting the Debtors' First Omnibus Objection to Proofs of Claim (the "Objection Order"). (A. 347-50). Listed under Exhibit "E," captioned "Litigation Claims – To Be Expunged" is this very claim against Merit (A. 385) in which the Court "ORDERED that each of the claims identified in Exhibits 'B' through 'F' hereto is hereby disallowed and expunged in its entirety" (A. 348). Also on October 8, 2003, the Bankruptcy Court entered an Order confirming the Debtors' Third Amended Joint Plan of Reorganization, dated August 18, 2003 (the "Confirmation Order"). (A. 446-512).

Pursuant to the Confirmation Order, the Bankruptcy Court discharged and enjoined the assertion of all claims

> based upon any act or omission, transaction, or other activity of any kind or nature that occurred prior to the Effective Date [as defined in the

> confirmed plan], whether or not such holder has filed a proof of claim or proof of equity interest, and whether or not the facts of, or legal bases, therefore, were known or existed prior to the Effective Date.

(A. 496). The Effective Date occurred on January 5, 2004. *See Montgomery County Maryland v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 496-97 (S.D.N.Y. 2005) (once a claim is expunged, the alleged obligation is entirely unenforceable).

Upon confirmation of a reorganization plan, the company that filed for bankruptcy ceases to exist. The newly reorganized company, while perhaps having the same name, is a new and separate legal entity and the discharge operates as a bar to proceeding with claims against the discharged entity. *See, e.g., In re Commercial Millwright Serv. Corp.*, 245 B.R. 603, 606 (Bankr. N.D. Iowa 2000) ("[t]he reorganized debtor operates as a new entity, free of its preconfirmation obligations except as provided in the plan").

In *In re Texaco Inc.*, 182 B.R. 937, 949 (Bankr. S.D.N.Y. 1995), the Court stated that Section 524(a)(2) of the Bankruptcy Code "expressly provides that the discharge operates as a permanent injunction against the commencement or continuation of any action to recover discharge[d] claims." *Id.* "[Section 524(a)] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect the discharge extinguishes the debt, and creditors may not attempt to avoid that." *Id.* (quoting H.R. Rep. 595, 95th Cong., 1st Session 365-66 (1977); S. Rep. No. 989, 95th Cong., 2nd Session 80 (1978)). Pursuant to 11 U.S.C. § 1141(d)(1)(A), the

confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation, and the word "debt" is defined by 11 U.S.C. § 101(12) as "liability on a *claim*." *In re Texaco Inc.*, 182 B.R. at 950 (emphasis in original).

Neither the District Court nor the Second Circuit below considered this issue in dismissing Petitioner's Complaint. Nevertheless, this is a threshold reason why this case is not appropriate for certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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